Press Summary

4 October 2023

Smith and another (Appellant) *v* Royal Bank of Scotland (Respondent)

[2023] UKSC 34

On appeal from: [2021] EWCA Civ 1832

Justices: Lord Hodge (Deputy President), Lord Briggs, Lord Kitchin, Lord Hamblen and Lord Leggatt

Background to the Appeal

The question on these appeals is whether claims seeking orders under the Consumer Credit Act 1974 to remedy unfairness in a credit relationship were brought in time.

The two claimants, Ms Karen Smith and Mr Derek Burrell, each had a credit card issued by the Royal Bank of Scotland plc ("**RBS**") and were sold Payment Protection Insurance ("**PPI**") by RBS. This insurance covered credit card repayments in the event of death, accident, sickness or involuntary unemployment.

RBS did not disclose to Ms Smith or Mr Burrell that most of the money paid by them for PPI did not go to the insurer but was retained by RBS as commission. Even to this day RBS has not revealed the exact size of its commission but it is now known that its commission was well over 50% of the payments made.

RBS only informed Ms Smith and Mr Burrell that it had received commission when it offered them redress (in 2018 and 2017, respectively) under a scheme for PPI mis-selling established by the Financial Conduct Authority. The redress payments were said to represent commission received by RBS in excess of 50% of the amounts they had paid for PPI. By that time Ms Smith had already ended her PPI agreement (in 2006) and her credit card agreement with RBS (in 2015). Mr Burrell had also ended his PPI agreement (in 2008), but his credit agreement continued (until terminated in 2019).

In August 2019, Ms Smith and Mr Burrell each brought a claim in the county court, seeking an order under section 140B of the Consumer Credit Act 1974 that RBS repay all the money paid by them for PPI (less the redress already paid), plus interest.

Ms Smith's claim succeeded before the district judge; and in Mr Burrell's case the district judge made a ruling that the claim had been brought in time. Those decisions were both upheld on appeal by the county court judge. On second appeals, however, the Court of Appeal ruled in favour of RBS, holding that in each case the relevant time limit for bringing a claim had expired before the claim was brought.

Ms Smith and Mr Burrell now appeal to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeals, holding that both claims were brought before the relevant time limit expired. The orders made in the county court in each case are, therefore, restored. Lord Leggatt, with whom the other Justices agree, gives the leading judgment. Lord Hodge gives a concurring judgment.

Reasons for the Judgment

Sections 140A–C of the Consumer Credit Act 1974 were added by the Consumer Credit Act 2006. They introduced a new regime intended to be less technical than the previous regime and to provide consumers with greater protection **[12]**. They require the court first to decide whether the relationship between the creditor and the debtor arising out of the credit agreement between them (either alone or taken with any related agreement) is unfair to the debtor because of one or more of three specified matters **[16]**. These matters are extremely broad and include not only any of the terms of the agreement but also anything done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement) **[22]**. In judging unfairness, the court must consider the whole history of the relationship and have regard to any matter that it thinks relevant **[23]**. But, if the relationship is still continuing, the question to be decided is not whether the relationship between the creditor and the debtor *was* unfair to the debtor when the credit agreement was made or at some other time in the past; it is whether the relationship *is* unfair to the debtor, ie at the time when the assessment is made **[19]**. Section 140A(4) makes it clear that, where the relationship has ended, the relevant time is the time when the relationship ended **[20]-[21]**.

If the court finds that the relationship is (or was at the time when it ended) unfair to the debtor, the court then has a broad discretion to decide what, if any, remedial order to make. The purpose of any such order is to remove the cause(s) of the unfairness which the court has identified, if they are still continuing, and to reverse any damaging financial consequences to the debtor of that unfairness, so that the relationship as a whole can no longer be regarded as unfair **[22]-[25]**.

RBS does not now dispute that in each case its failure to disclose the commission that it received made the relationship arising out of the credit agreement (taken with the related PPI agreement) unfair to the claimant and that, if the claim was brought in time, the remedial order made in the case of Ms Smith was one which the court was entitled to make **[30]**. Its main argument is that the claims are barred by section 9 of the Limitation Act 1980 because they are claims to recover money brought "after the expiration of six years from the date on which the cause of action accrued" **[31]**.

RBS has argued that the "cause of action" (ie the right to claim a remedy) accrued when each of PPI payment was made. As the last such payment was made in, respectively, April

2006 (by Ms Smith) and March 2008 (by Mr Burrell), the six year time limit had expired in each case long before their claims were brought in 2019 **[32]**.

The Supreme Court rejects this argument (as did the Court of Appeal). In each case the right to claim a remedy depends on whether the relationship was unfair to the claimant at the time when the relationship ended (see above). Therefore, the cause of action did not accrue, and the six year period for bringing a claim did not commence, until the credit relationship ended (in 2015 and 2019, respectively) **[42]-[45]**. It follows that both claims were brought in time.

As an alternative argument, RBS relied on the Court of Appeal's reasoning. This was that the claims are time-barred because "the relevant unfair relationship came to an end" when the last PPI payment was made (in April 2006 in the case of Ms Smith) **[65]**. In the Court's view, this confuses the question of when the relationship came to an end with the different question of when (if at all before it came to an end) the relationship ceased to be unfair. The Court of Appeal recognised, correctly, that, after a credit relationship has ended, the fairness of the relationship must be judged at the point in time when the relationship came to an end (ie in 2015 for Ms Smith and 2019 for Mr Burrell) **[65]**.

It is a further substantive question going to the merits of the claim whether the relationship between RBS and Ms Smith, although still continuing, ceased to be unfair to her after she made her last PPI payment in April 2006 **[65]**. The Court of Appeal thought that it did on the ground that there was no case, alleged or proved, that any economic effect of the PPI agreement for Ms Smith persisted after April 2006 **[66]**. The Supreme Court disagrees. The relationship remained unfair to Ms Smith after April 2006 because RBS did not repay any of the sums which she had paid for PPI cover (a persisting economic effect), nor did it disclose to her the existence let alone the amount of the commission that it had received out of those payments. This was still the position when Ms Smith's relationship with RBS ended in 2015 **[66]-[67]**. The same applied in Mr Burrell's case.

The Court also confirms that the Court of Appeal was right to reject a further and separate argument made by RBS that the claims were excluded by the transitional provisions that applied when sections 140A–C of the 1974 Act were brought into effect **[81]-[84]**.

Lord Hodge concurs with Lord Leggatt's reasoning and conclusions, further explaining that the fact that the six year period for bringing a claim does not start to run until the credit relationship ends does not unduly expose RBS and other creditors to stale claims. This is because the court always has a discretion as to what, if any, remedy to grant. If a debtor sits on his or her hands with knowledge of the relevant facts, it would be, as Lord Leggatt states, inconceivable that a court would think it just to make an order under section 140B of the 1974 Act **[89]**.

References in square brackets are to paragraphs in the judgment.